No. 87-154

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSHUA DESHANEY, a Minor, by his guardian ad litem, and MELODY DESHANEY,

Petitioners,

—v.—

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION CHILDREN'S RIGHTS PROJECT, THE ACLU OF WISCONSIN, LEGAL SERVICES FOR CHILDREN, THE JUVENILE LAW CENTER, BAY AREA COALITION AGAINST CHILD ABUSE, AND THE NATIONAL WOMAN ABUSE PREVENTION PROJECT IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION CHILDREN'S RIGHTS PROJECT, THE ACLU OF WISCONSIN, LEGAL SERVICES FOR CHILDREN, THE JUVENILE LAW CENTER, BAY AREA COALITION AGAINST CHILD ABUSE, AND THE NATIONAL WOMAN ABUSE PREVENTION PROJECT, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

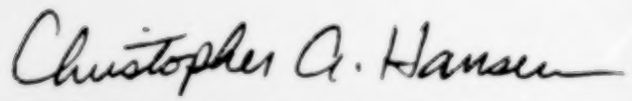
The American Civil Liberties Union Children's Rights Project (ACLU), the ACLU of Wisconsin, Legal Services for Children, the Juvenile Law Center, Bay Area Coalition Against Child Abuse and the National Woman Abuse Prevention Project, hereby move for leave to file the attached brief amicus curiae pursuant to Rule 36.3 of the Rules of this Court. Petitioners have consented to the filing of this brief. Counsel for respondents, however, has been unwilling either to consent to the filing of this brief or to refuse consent.

This case involves important questions about the scope of 42 U.S.C. § 1983 and the constitutional liability of state child

care workers. Each of the amici is concerned with protecting the rights of children and has extensive experience in advocacy on behalf of children, including children such as petitioner who have become the responsibility of the state child protection system. Each of the amici also believe that the decision of the court of appeals denying liability is erroneous. Accordingly, amici respectfully move for leave to file the attached brief amicus curiae in order to present the Court

with our views on this important case.

Respectfully submitted,



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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Wisconsin is one of its state affiliates.

The ACLU has long maintained a Children's Rights Project to defend and protect the constitutional guarantees to which children are entitled under law. The Children's Rights Project represents children in the child welfare systems of a number of states in litigation to enforce federal child welfare statutes (e.g., 42 U.S.C. § 670 et seq. and 42 U.S.C. § 5103), and to ensure that the basic rights of children affected by state child welfare systems are protected. This case involves one component of child welfare, the child

protective system. The ACLU believes that the state's child welfare decisions can and should be subject to the same constitutional principles that constrain or compel government conduct in other contexts. In addition, this case raises questions about the scope of § 1983 that affect numerous ACLU lawsuits around the country.

Legal Services for Children, Inc., is a private, nonprofit law firm founded in 1975 solely to represent minors in juvenile court and other proceedings affecting the health, education, and welfare of minors. Legal Services for Children is based in San Francisco, California, and has participated in numerous cases affecting children, including Honig v. Doe, 108 S. Ct. 592 (1988).

The Juvenile Law Center (JLC) is a public interest law firm that has provided

free legal services to children in Pennsylvania since 1975. JLC has represented hundreds of abused and neglected children in Philadelphia Family Court, and has been involved in federal litigation, at trial and appellate levels, aimed at vindicating the rights of children served by county child welfare agencies. In recent years JLC has had a particular emphasis on enforcing P.L. 96-272, the federal Adoption Assistance and Child Welfare Act of 1980, in Pennsylvania.

Bay Area Coalition Against Child Abuse, based in San Francisco, California, is a coalition of agencies and individuals working in and concerned with the area of preventing child physical and sexual abuse and protecting children from such abuse. The Coalition includes such agencies as San Francisco Child Abuse Counsel, San

Francisco Commission on the Status of Women, the Children's Self-Help Project, Child and Adolescent Sexual Abuse Resource Center, the San Francisco Victim Witness Assistance Program, and Passage Ways.

The National Woman Abuse Prevention Project is funded by the Department of Justice and organized to end abuse against women and their children. The Project is based in the District of Columbia and provides education and training for child protection workers and professionals in the area of domestic violence.

SUMMARY OF ARGUMENT

This Court's decisions have frequently recognized a substantive due process right under the Fourteenth Amendment to personal security.[1/] E.g. Youngberg v. Romeo, 457 U.S. 307 (1982). In this case, respondents violated that right by allowing Joshua DeShaney to be seriously harmed after the state undertook to protect his physical safety.

The existence of that right does not and should not depend on whether Joshua was in the formal legal custody of the state or in the state's institutional care. Rather the critical question is whether, as here, the state voluntarily and affirmatively assumed responsibility for the

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1/ The phrase "personal security" was used by this court in Youngberg, 457 U.S. at 315. In this case, it refers to the limited right to be protected against physical harm.

protection of a specific individual when (1) that individual was unable to protect himself and (2) the state's assumption of responsibility effectively precluded others from protecting him. As a five year old child, Joshua DeShaney was clearly such an individual.

The court below nevertheless ruled in respondents' favor in part because the Constitution is "a charter of negative rather than positive liberties." DeShaney v. Winnebago County Dep't of Soc. Serv., 812 F.2d 298, 301 (7th Cir. 1987). Amici agree that states are not constitutionally compelled to create a child protection system, any more than a state has an obligation to create a mental retardation system. Youngberg v. Romeo, 457 U.S. at 317. However, once the state creates a child protection system and undertakes

responsibility for protecting a particular child, it may be held liable for failure to fulfill that responsibility whether its failure is described as omissive or commissive. Youngberg v. Romeo, 457 U.S. 307 (1982); Smith v. Wade, 461 U.S. 30 (1983); Estelle v. Gamble, 429 U.S. 97 (1976). This is especially true because the distinction between action and inaction is ultimately illusory.

Finally, this Court need not reach the question of whether gross negligence (or something less than intent) is sufficient to establish liability for a violation of substantive due process because that question was not reached by the courts below. See n.15, infra. If the Court does reach that question, it should hold that respondents' gross negligence can and should give rise to constitutional

liability. This Court has previously found that gross negligence (or something less than intent) is sufficient for liability under § 1983 in cases alleging violations of the Fourth and Eighth Amendments. U.S. v. Leon, 468 U.S. 897 (1984); Monroe v. Pape, 365 U.S. 167 (1961); Estelle v. Gamble, 429 U.S. 97 (1976); Smith v. Wade, 461 U.S. 30 (1983). There is no basis in logic or law to deny similar liability when the Fourteenth Amendment has been violated instead. Indeed, strong policy considerations favor acknowledgement of a right to recover damages upon a showing that respondents violated the Fourteenth Amendment in a grossly negligent manner.

ARGUMENT

I. RESPONDENTS VIOLATED THE PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

The Constitution does not provide a generalized right to safety. Thus, individuals who allege that they were victims of crimes or even abuse that the police or child protection agencies failed to prevent typically have no cause of action under the Due Process Clause.

However, this Court has recognized in a number of contexts that the right to personal security is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment when the state has undertaken a specific responsibility to assure a specific person's safety.2/

2/ Amici have characterized this right as one of substantive due process. The same right could also be cast in procedural terms. By creating a child protection system with certain mandatory duties to

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For example, in Youngberg v. Romeo, 457 U.S. 307 (1982), the plaintiff, a mentally retarded adult, alleged that the state had taken responsibility for ensuring his physical safety and then failed to protect him from physical injury. The Court had little difficulty holding that the plaintiff alleged a violation of the Due Process Clause, stating that the "right to personal security constitutes a 'historic liberty interest' protected by the Due Process Clause." Id. at 315 (citation

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2/ (...continued)
protect children reported to the state as needing the protection of the applicable child protection laws, the state of Wisconsin created a liberty or property interest in at least those protective steps defined as mandatory by state law. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc); Actionable Inaction: Section 1983 Liability for Failure to Act, 55 U. Chi. L. Rev. 1048 (1986). The procedures necessary to deprive a child of that interest would be minimal professional decision-making by the agency. See Youngberg v. Romeo, 457 U.S. 307 (1982). By failing to follow those procedures here, the state also violated Joshua DeShaney's right to procedural due process.

omitted). The Court has recognized the same right for prisoners, Hutto v. Finney, 437 U.S. 678 (1978) and students, Ingraham v. Wright, 430 U.S. 651, 672-673 (1977). Moreover, the Court has traced the origin of this right to Article 39 of the Magna Carta. Id. at 673 n.41.

This Court has never held that formal state custody is a necessary predicate to establish the constitutional right to personal security under the Fourteenth Amendment. Thus, the school children whose right to personal security was recognized in Ingraham remained in the legal custody of their parents. Similarly, petitioner's due process claim cannot be defeated merely by noting that the injuries he suffered were not inflicted by state employees. The injuries suffered by Nicholas Romeo were not inflicted by state employees

either; rather, they were inflicted by private individuals living in the institution with him. Youngberg v. Romeo, supra. Finally, the guarantee of personal security does not depend on institutional confinement. Indeed, in Youngberg, the Court emphasized that the right to personal security was not "extinguished by lawful confinement," 457 U.S. at 315, necessarily implying that the right exists outside the context of institutional care. If Nicholas Romeo had been in a state operated group home or a foster home, rather than an institution, his right to personal security would have been the same. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), cert. pending, 56 U.S.L.W. 3290 (filed 9/25/87); Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). See generally Mushlin,

Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199 (Winter 1988).

Physical or legal custody of a person presumptively triggers the right to personal security because of the degree of responsibility the state has assumed for protecting specific, often vulnerable individuals. For that very reason, however, the existence of a right to personal security in a particular case does not turn on the formal legalisms of custody or confinement, but rather on the degree to which the state has assumed responsibility for the protection of a specific individual when that individual -- here a small child -- is unable to protect himself and the state's assumption of responsibility

effectively precludes others from protecting him.

Applying these substantive due process principles, at least two courts of appeals have concluded that the state should be liable for its failure to protect children, like Joshua DeShaney, who it agreed to protect from physical injury. Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984). See also Martinez v. California, 444 U.S. 277 (1980).

A. Respondents In This Case Voluntarily Assumed Extensive Responsibility For Protecting Joshua DeShaney

There is no dispute in this case that the State of Wisconsin assumed significant responsibility for Joshua DeShaney's personal security after it learned that there was a serious danger that he might be

beaten by his father. The reasons for that concern are apparent from the record.

Joshua DeShaney was born on March 21, 1979.[3/] In 1980, a Wyoming state court granted custody of him to his father who then moved with Joshua to Wisconsin. As a result of a proceeding initiated by the respondents, Joshua's mother, who remained in Wyoming, was ordered by a Wisconsin court to pay child support. Beginning in 1982 and continuing until his near fatal beating in March 1984, respondents received no fewer than 11 reports that Joshua was being beaten by his father or other adults in his father's home. On at least nine

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3/ Virtually all of the specific facts of this case are taken from the opinion of the court of appeals, DeShaney v. Winnebago Co., 812 F.2d 298 (7th Cir. 1987). Any additional facts are derived from the case record created by the state child protection agency for Joshua and made part of the record in this case. (See especially memo of A. Kemmeter, dictated 3/11/84 and transcribed 3/15/84.)

occasions, respondents personally saw or were advised of specific injuries including cigarette burns, lacerations, and bruises. At least four of these incidents, prior to Joshua's final injury, were sufficiently serious that Joshua was taken to the hospital.

In response to one of the first reports of abuse, respondents took Joshua into state custody in 1983. He remained in custody for approximately three days. Upon his release, respondents were sufficiently concerned about the likelihood that Joshua would be abused again that they insisted that his father contract with them for a period of supervision and services pursuant to Wisc. Stat. § 48.245. One of the primary purposes of the contract was to ensure that Joshua not be injured again. Accordingly Joshua's father agreed to the

state's demand to enroll him in a Head Start program so that there would be other adults who could monitor the situation. As respondents were aware, he failed to do so.

Respondents, in turn, agreed in the contract to visit the Deshaney home on a periodic basis and to provide Joshua with further protection if there were additional evidence of child abuse. Pursuant to that agreement, respondent Kemmeter, a case-worker with the child protection system, did visit the home on numerous occasions. While there, she repeatedly observed physical signs of abuse and assault on Joshua's face and body. Indeed, the injuries were sufficiently serious that she later said she had expected Joshua would be killed by his father. Nevertheless, she took no action to protect the young child.

In March 1984, Joshua's injuries became so acute he went to the hospital again. The cumulative effect of his repeated injuries was such that he now suffers from severe brain damage.4/

4/ The district court did not address the question of causation. The court of appeals found that the state could not have "caused" the harm to Joshua by arguing that if the child protection agency had not existed, he would still have been hurt. DeShaney, 812 F.2d at 302. Such an argument confuses two concepts. The state had no duty to create a child protection agency and if it had not created one, it could not be said to have caused Joshua's injuries. However, the state did create such an agency. The agency undertook to protect Joshua. The agency knew Joshua was in danger. The agency had the authority to remove Joshua from his father but did not do so and even the court of appeals found its failure to be "reckless." Id. at 303. Others relied on the agency to protect Joshua. It is these four factors -- knowledge of the specific danger to a specific person who cannot protect himself, authority to protect that person, preemption of authority by others to protect the person, and assumption of responsibility to protect that person -- that distinguish this case from Martinez v. California, 444 U.S. 277, 285 (1980), and justify a finding that the state "caused" the deprivation. If the agency had removed Joshua, or taken any number of other reasonable steps such as ensuring that Joshua's father did live up to his contract to

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B. The Wisconsin Child Protection System Is Designed To Protect Children Like Joshua Who Are Unable To Protect Themselves, And Its Authority Is So Broad That It Effectively Preempts The Protective Efforts of Others

1. The Wisconsin Child Protection System Is Designed To Protect Vulnerable Children Like Joshua Deshaney

Wisconsin, like every other state, has created a child protection system whose sole purpose is to protect children from prospective physical harm inflicted by their custodians. Wisc. Stat. § 48.981.

4/ (...continued)
place Joshua in Head Start where other adults could have protected him, or investigating each of the injuries Joshua suffered as required by law, or increasing supervision of the family as the evidence of abuse mounted, or insisting on seeing Joshua on the last two visits to the home when his increasing danger might have been discovered, then it is entirely possible that Joshua would not have been injured. These "reckless" actions and inactions (see Point II, infra) are sufficient to establish causation. At the very least, because the district court did not address the causation question, this Court should remand for it to express its views on that question.

That system is responsible for accepting reports of possible abuse or neglect, investigating the validity of those reports and taking action to protect children where necessary either by supervising the home or taking the children into custody. Id. In this respect, the state's assumption of responsibility for children in the child protection system is substantially greater than for people in the mental retardation, school, or prison systems. Each of those latter systems is created for many purposes. The mental retardation system is to provide care and habilitation. The school system is to educate. The prison system is to punish, to deter, and to rehabilitate. For each of these systems, the responsibility for ensuring the physical security of the persons affected is an incidental consequence of the other state

purposes. By contrast, the sole purpose of the state's child protection system is to protect children from future physical harm by their own families. The integrity of the family is an important, indeed constitutionally protected interest. Bellotti v. Baird, 443 U.S. 622, 638 (1979); Santosky v. Kramer, 455 U.S. 745, 753, 758-759 (1982). Yet, that interest is overridden, in the child protection system, by the state's sole and compelling interest in protecting children from future physical harm. See Santosky v. Kramer, 455 U.S. 745, 766 (1982) (recognizing the state's "parens patriae interest in preserving and promoting the welfare of the child.")

The Wisconsin child protection system, like the child protection systems of the 46 states that receive federal child welfare funds, is regulated by the federal Child

Abuse Prevention and Treatment Act. 42 U.S.C. § 5101 et seq. That Act requires an adequate system for reporting possible abuse or neglect, and a prompt investigation of the report so that "upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child ..." 42 U.S.C. § 5103 (B)(C). The same statute creates a National Center on Child Abuse and Neglect to provide research, training, technical assistance, study and reports about child abuse. 42 U.S.C. § 5101.

Although child protection systems vary from state to state, they share common features stemming from federal law and well-established social work principles. The Wisconsin system is thus typical. Reports of abuse or neglect can come from anyone, but there are certain people, such

as doctors, teachers or police, who are usually required by state law to report any suspicion of abuse or neglect. Wisc. Stat. § 48.981(2). Once a report is received, the child protection system "shall ... commence an appropriate and thorough investigation" to determine if the child is in need of protection or services. Wisc. Stat. § 48.981 (3)(c)(1). The investigation must begin within 24 hours and include, if possible, observation of or an interview with the child, or both, and a visit to the family, observation of the child while in the family setting, and interviews with the parents, other siblings, neighbors, and the person who made the allegation. Wisc. Stat. § 48.981 (3)(c)(1). This inquiry occurs with or without the consent of the parents. Where a child requires immediate protec-

tion the worker may immediately remove the child from his or her parents. Wisc. Stat. §§ 48.981 (3)(c)(5). Within 60 days, the child protection agency must determine whether abuse or neglect, as defined by the statute, has occurred. Wisc. Stat. §§ 48.981 (1); 48.981 (3)(c)(3).

Because of the importance of protecting children and their unusual inability to protect themselves, the child protection system in Wisconsin, like that in other states, has unusually intrusive power. The state may contact, observe or interview the child alleged to have been abused or neglected at any location without permission from the child's parent. It may compel a family to accept services upon penalty of removal of the children from the home. Wisc. Stat. § 48.245. In the case of Joshua DeShaney, one of the "services"

that the state attempted to compel the family to accept was to force the common law wife and mother to leave the home. DeShaney, 812 F.2d at 300. Commonly required services include the entry by a parent into an in-patient or out-patient therapy program, or agreement to unannounced visits to the home. Usual protections of confidentiality between doctors and patients as well as other professionals and their clients are abrogated. Wisc. Stat. § 48.981 (2). Ultimately the child protection system may remove a child from his parents. Wisc. Stat. § 48.981 (3)(c)(5).

A state responding to an allegation that a child has been abused or neglected has a number of options. It must investigate the report. If it determines the report is valid, it may, without obtaining

legal custody, generally supervise the family while the child is in the home, Wisc. Stat. § 48.245, or it may leave the child in the home but require the family to receive certain services. Wisc. Stat. § 48.245. The state may obtain custody of the child but leave the child in the home. Wisc. Stat. § 48.345. It may remove the child from the home and place him or her out of the home in a foster home,[5/] group

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5/ Federal and most state laws require that where possible, any needed services be provided to the family as a unit rather than breaking up the family by placing the children in foster care. Wisc. Stat. § 48.01 (1)(e); 42 U.S.C. § 671 (a)(15). The State must make "reasonable efforts" to prevent placement. Id. Services to families that prevent the need for placement are referred to as preventive services. Preventive services can also include placing the child in the state's legal custody while allowing the child to continue to live with the parents. Preventive services are generally voluntary, but can be imposed on the family by court order as the only option to foster care placement. Wisc. Stat. § 48.345.

If preventive services will not be sufficient to protect the child or are otherwise inadequate to

(continued...)

home, or institution. Id. Finally, it may remove the child from the home and seek to terminate the rights of the parents so that the child can be adopted. Wisc. Stat. §

5/ (...continued)
meet the family's needs, it may be necessary to place the child into the foster care system. Children can be placed in individual foster homes, group homes or other small congregate settings, or institutions. The foster homes or congregate settings can be operated by the government directly or by contract with private individuals or agencies supervised by the state. Foster care is supposed to be temporary. The primary goal is to provide such services as are necessary to allow the child to return home.

The federal Adoption Assistance and Child Welfare Act contains detailed requirements regulating foster care in all of the 46 states receiving federal foster care funds. The law requires that there be case planning and case review, that the state provide "proper care" to children in foster care and "assure ... the permanent placement of the child ...," that foster homes and institutions be supervised on the basis of nationally recognized standards, and that children be placed in the least restrictive setting. 42 U.S.C. §§ 671 (a)(16); 675 (1); 675 (5)(B); 675 (1); 627 (2)(C); 671 (a)(10); 675 (5)(A). See also 45 CFR Parts 1355-1357; 48 Fed. Reg. 23104 et seq.

48.40 et seq. See Santosky v. Kramer, 455 U.S. 745 (1982).

2. The State's Authority Is So Broad That It Effectively Preempts The Protective Efforts of Others

In both Youngberg and Estelle, this Court emphasized that the injured plaintiff -- in one case a mentally retarded person and in the other case a prisoner -- had relied completely on the state for his or her protection. Youngberg, 457 U.S. at 317; Estelle, 429 U.S. at 103. A child abuse victim is similarly vulnerable and similarly dependent on the state to provide protection from parental abuse or neglect.

Joshua DeShaney sadly illustrates the problem. He was five years old when the injuries at issue in this case occurred. Obviously, he was unable to protect himself. In this respect, his need to be protected was even greater than that of the

prisoner who, although confined in the institution, can flee the area where abuse is threatened, attempt to persuade the abuser to desist, complain to the authorities, or take a number of other actions to protect himself, none of which were realistically available to Joshua and other children in the same predicament.

Even children much older than Joshua are typically unable to protect themselves from child abuse without the sort of outside assistance that respondents offered in this case and then never provided. Child abuse victims are often very passive as a result of the abuse. They are thus less likely to be able to report abuse. Jones, "Characteristics and Needs of Abused and Neglected Children," Social Work with Abused and Neglected Children (ed. Faller 1981). They are frequently intimidated so

that they will not report abuse. See Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). They have unusual difficulty forming relationships with peers and adults. Kinard, Mental Health Needs of Abused Children, Vol. LIX, Child Welfare 451 (September/ October 1980). In addition, they are often extraordinarily protective of the abusing parent. Wasserman and Rosenfeld, Decision-Making In Child Abuse and Neglect, LXV Child Welfare 515 (Nov., Dec., 1986).

The tragedy of petitioner's reliance on the state to protect his personal security is compounded by the fact that there were other people who could have intervened to protect Joshua if the Wisconsin child protection system had not asserted its authority for his protection. The first complaint about possible abuse was received

from Joshua's stepmother, who left the home and complained to the police that Mr. DeShaney "hit the boy, causing marks and is a prime candidate for child abuse." DeShaney, 812 F.2d at 299. Nothing was done, despite the mandatory nature of the statute requiring an investigation by the state child protection agency. On at least four other occasions, hospital officials who treated Joshua notified the state child protection system that Joshua was being abused and on at least two of these occasions, there was "no reaction" from that system. DeShaney, 812 F.2d at 300. One additional report of abuse came to the state child protection agency from the police but was not investigated. The contract signed by the state child protection agency and Joshua's father after Joshua's first hospitalization required the father

to enroll Joshua in Head Start so that the program could monitor his safety. He was not enrolled and when the Head Start worker went to the house, she found Joshua had been left alone. She reported this fact to the child protection agency.

In each of these instances, the persons reporting abuse relied on the child protection system to fulfill its mandatory duties and to investigate and protect Joshua. They might have taken additional actions if they had known the Wisconsin authorities would ignore the reports. Indeed, none of these people had the authority to intervene in the DeShaney family because the state had given the exclusive authority for intervention to the child protection system.

In addition, Joshua's mother, who lived in Wyoming, did not have custody of

him and thus could not remove him from the dangerous situation. Even she was required by law to rely, in emergencies and in the first instance, on the child protection system to investigate reports of abuse of her son. The complaint in this case specifically alleges that had Joshua's mother known of the abuse, she would have tried to take steps to protect Joshua (such as seeking a court ordered change in custody). Although her options were limited by the state's preemption of the right to protect Joshua, the state did not even take the minimal step of notifying this mother that her son was being abused. Complaint, ¶30.

The child protection system in Wisconsin and elsewhere imposes reporting requirements on the people most likely to observe child abuse because of their professional relationship to children. Wisc.

Stat. § 48.981 (2). Once a person has reported a case of abuse to the child protection agency required by statute to investigate it, that person has no further authority to act. Instead, the law mandates that the exclusive jurisdiction for further activities necessary to protect children is in the child protection system which has both the resources and the responsibility to protect children -- like Joshua -- who are known to be in danger.

C. A Fair Balancing Of The Interests Of Children, Families, And The State Supports Recognition Of A Constitutional Right To Personal Security For Children Reported To Child Protection Systems

There are three concerns that might be expressed about recognizing a constitutional right to personal security for child abuse victims whom the state has identified and undertaken to protect. None justify the failure to recognize such a right under the circumstances of this case.

First, decisions in the child protective area inevitably involve the exercise of professional judgment. It is important that any rule give sufficient latitude to permit professionals to make the difficult judgments their job requires. Youngberg v. Romeo, 457 U.S. at 323. It would be inappropriate to hold a state professional liable over a disagreement as to how that judgment should have been exercised. Id.

However, it would be equally inappropriate not to hold the same professional liable when the professional's action "is such a substantial departure from accepted professional judgment, practice, or standards that the person responsible actually did not base the decision on such a judgment." Id.

That failure can be measured, as in this case, by generally accepted standards in child protection. The relevant state statute, and often state regulations or policies, contain certain minimum requirements to govern state conduct. For example, in Wisconsin, the child protection agency must initiate an investigation of any allegation of child abuse or neglect. Wisc. Stat. § 48.981(3)(c). The Wisconsin investigation must include an interview with the child. Id. It must be in

accordance with standards established by the department for conducting child abuse and neglect investigations, and it must be "appropriate and thorough." Id. Obviously, the degree of thoroughness called for in a specific case involves the exercise of judgment to which the court should defer. Youngberg v. Romeo, 457 U.S. at 322. But if no investigation of any kind is begun, or if there is no interview with the child, or if the investigator violates other clear standards established by the agency, then it is fair to say that there has been no exercise of professional judgment and liability is appropriate.

Other professional standards are established by national child welfare organizations. The Child Welfare League of America has had standards governing the investigation of allegations of abuse and

neglect for almost 30 years. See e.g., Child Welfare League of America Standards for Child Protective Service (1960); Standards for Child Protective Service (1973) (latter hereinafter CWLA). These standards were developed with the assistance of professional child welfare experts from around the country and are generally accepted in the field as authoritative, minimum standards for child protective investigations. See also Stein, "An Overview of Services to Families and Children in Foster Care," Foster Children in the Courts, ed. Hardin, American Bar Association (1983); Wald, State Intervention on Behalf of Neglected Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623 (1976).

In this case, respondents' actions went far beyond a mistake in judgment. Those actions represent such a substantial departure from professional judgment, practice, or standards that they amount to a failure to exercise any professional judgment.[6/] Respondents received at least five reports of abuse or neglect which were not investigated despite the mandatory requirement that all reports be investigated.[7/] Wisc. Stat. §48.981(3)(c)(1). See CWLA at 21. On at least three additional

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6/ Petitioner's complaint contains broad allegations concerning departure from professional standards which, because this case proceeded by summary judgment, petitioners have not yet had the opportunity to prove. The facts in the text, however, appear undisputed.

7/ The very first report in 1982 was not investigated. There were two reports from emergency room nurses in November 1983 that were ignored. A Head Start worker found Joshua alone in January 1984. Nothing was done. In September 1983 the police advised the agency that Joshua was being abused. Again, nothing was done.

occasions, the respondent Kemmeter saw injuries to Joshua but did not investigate. The number and nature of the injuries was such that the agency should have at least had him evaluated by competent medical experts to determine the cause of the injuries and considered removing Joshua from his home or utilizing increased in-home supervision that would have protected him. Wisc. Stat. §§ 48.981(3)(c)(5); CWLA at 25; Besharov, Defending Child Abuse and Neglect Cases. There is no evidence that this option was even considered. Joshua's father entered into a contract designed to protect Joshua but, as respondents were aware, did not fulfill the contract. Under state law respondents were required to notify the District Attorney and at least consider removal. Wisc. Stat. §§ 48.245 (7); CWLA at 37-39. This was not done.

Each of these failures, and perhaps others, violated state law and good professional standards.[8/]

There is little danger that recognition of liability under these circumstances would either inhibit or skew professional decision-making under the standard applied by this Court in Youngberg. Damages would be unavailable against a child protective worker who followed the mandatory duties outlined by statute, regulation and policy.[9/] A worker who made a professional judgment would be immune. Only if the worker's actions are so out-

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8/ For further discussion, see brief of Amicus Curiae Massachusetts Committee for Children and Youth.

9/ This does not amount to the federalizing of state statutes or professional standards. State statutes and professional standards are relevant in the same way they were found relevant by this Court in Youngberg, as a guide for determining when the state employee's are so grossly negligent that they cannot be said to have involved the exercise of professional judgment.

rageous that they amount to a failure to exercise even minimal professional judgment would liability be possible.

The court of appeals in this case was concerned that recognition of the right to safety in this context would cause workers to err on the side of terminating parental rights. This concern, however, reflects a misunderstanding of the child welfare system. The alternative to leaving Joshua in his home was not termination of parental rights, but removal and placement into foster care or other more intensive in-home supervision. See n.5, infra. Even this alternative would not create an incentive for workers to remove children from their families. Workers who have failed to exercise professional judgment in making a decision to remove a child ought to be as liable as the worker here who failed to

exercise professional judgment in not removing Joshua. If the same standards govern failure to remove and improper removal -- i.e., liability is imposed only in the absence of professional judgment -- there should be no incentive for workers to commit either error at the expense of the other.10/

To the contrary, recognizing a constitutional right in these circum-stances would provide a healthy incentive for child protection workers to conform their conduct to a minimally acceptable standard.11/

Child abuse is a serious problem in this

10/ The fear of distorting the decision-making process is further mitigated by the gross negligence standard articulated in Point III, supra.

11/ State tort laws potentially have a similar effect. However, child protective workers in many states have absolute immunity under state law. Mushlin, Unsafe Havens at 245-249.

country. There were an estimated 2.25 million reports of suspected child abuse or neglect in 1987. National Center on Child Abuse Prevention Research, Child Abuse Fatalities Remain High: Results of the 1987 Annual Fifty State Survey (March 1988), at 3. There were an estimated 1132 deaths attributable to child abuse. Id. at 7. Those laws intended to protect children like Joshua are meaningless if they are unenforceable. If § 1983 liability were available, other vulnerable children like Joshua might be saved from physical or sexual abuse.

Finally, the slippery slope argument is not a persuasive reason for denying liability in this case. Amici recognize the attractiveness of custody as a bright line for determining the limits of liability. However, it is a false clarity that

does not reflect the reality child care in this country.12/

A due process right to personal security undoubtedly extends to children in foster care. E.g., Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). Given the existence of this well-settled right, it is both reasonable and appropriate to hold state officials liable when the state undertakes to protect a particular child known to be at risk of physical harm, when the state's undertaking effectively precludes others from protecting him, and when the state then fails to exercise even minimal judgment in fulfilling its duty. The tragedy

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12/ The lines of custody are often blurred in the foster care context. For example, foster children may be discharged to their parents on a "trial" basis. In some instances, the child remains in the legal custody of the state and the physical custody of the parents.

of Joshua DeShaney should not be compounded by denying him even the chance for recovery on the facts of this case.

II. LIABILITY DOES NOT DEPEND ON THE IMPOSSIBLE DISTINCTION BETWEEN OMISSION AND COMMISSION

The Seventh Circuit held that because the "Constitution is a charter of negative rather than positive liberties...the state does not have a duty...to protect children from their parents." DeShaney, 812 F.2d at 301. Neither petitioners nor amici quarrel with that proposition. Nonetheless, once the state assumes responsibility for protecting a specific individual who cannot protect himself, it must not do so in a way that causes further harm -- especially when the state's assumption of responsibility effectively precludes others from providing private assistance.

The court was equally incorrect in its broader assertion that the Constitution never protects citizens from the state's failure to act. Not only does the distinction between action and inaction prove illusory in specific cases, it is directly contrary to a series of decisions by this Court.

The right to personal security discussed in Point I is, by definition, a right to be protected from the state's failure to act. In Youngberg, both parties and every member of the Court took as given that Nicholas Romeo had a substantive due process right to receive "adequate food, shelter, clothing, and medical care" while in the state institution. 457 U.S. at 315. Failure to provide that right clearly states a constitutional claim. Similarly, this Court held in Estelle v. Gamble, 429

U.S. at 103 and 106, that the Eighth Amendment was violated by the state's "failure[s]" and "omissions" in providing medical care to inmates. See also Smith v. Wade, 461 U.S. 30 (1983); Hutto v. Finney, 437 U.S. 678 (1978).

In U.S. v. Classic, 313 U.S. 299, 326 (1940), the Court held that the "failure" to run a fair election was a "misuse of power" and unconstitutional. And in Scheuer v. Rhodes, 416 U.S. 232, 241-242 (1974), the Court held that "public officials...who fail to make decisions when they are needed or who do not act to implement decisions when they are made" can be liable.13/

13/ The courts of appeals have found "omission" sufficient to support liability in a wide variety of contexts. DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978); Doe v. NYCDSS, 659 F.2d 134 (2d Cir. 1984); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 (continued...)

These decisions accurately reflect the legislative history recited in Monroe v. Pape, 365 U.S. 167 (1961). As explained by Senator Edmunds, floor leader for §1983, "state action may consist in executive nonfeasance as well as malfeasance . . . ." Id. at 228. Even more to the point, Senator Edmunds described §1983 as providing a cause of action for denial of constitutional rights "whether the denial

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13/ (...continued)
F.2d 185 (4th Cir. 1984); Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981); Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972); Watts v. Laurent, 774 F.2d 168 (7th Cir. 1985); White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); Morrison v. Washington Co., 700 F.2d 678 (11th Cir. 1983), cert. denied, 464 U.S. 864 (1983); Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); Coleman v. Alabama, 827 F.2d 1469 (11th Cir. 1987); Note, Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy," 29 Wayne L. Rev. 1225 (1983).

be acts of omission or commission . . . ." Cong. Globe, 42d Cong., 1st Sess. at 85.

In many constitutional contexts, the line between omission and commission simply makes no sense. For example, the right to procedural due process is violated only when the state fails to act. No one has a right to a drivers' license, Bell v. Burson, 402 U.S. 535 (1971), or to welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), and thus it is not unconstitutional for the state to deprive someone of those benefits with appropriate procedures. However, if the state deprives someone of a drivers' license or welfare benefits without a hearing, then the state has acted unconstitutionally. Id. It is the failure to provide due process procedures -- the "omission" of those procedures -- that triggers the violation. Id.

Likewise, when the state attempts to use a statement obtained from a suspect who has not been given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), the violation is not the "commission" of questioning the suspect. There is nothing in the Fifth Amendment that prohibits all questioning. The violation is the state's "omission" in failing to give the required warnings.

Other examples illustrate the impossibility of attempting to define a specific set of facts as omission or commission. When the state violates the Fourth Amendment by searching a home under circumstances in which a warrant is required but does not obtain a warrant, is the violation the "commission" of the search or the "omission" of failing to obtain the warrant? When the state violates

the Equal Protection Clause of the Fourteenth Amendment by granting a benefit to whites only, is the violation the "commission" of granting the benefit to whites or the "omission" of refusing it to blacks?

The illusory attempt to distinguish omission from commission is a diversion from the real issues in this case. If Joshua DeShaney had a right to personal security and the state's failure to protect him was grossly negligent, then liability should be available.

III. LIABILITY SHOULD BE AWARDED UPON A FINDING THAT THE RESPONDENTS VIOLATED PETITIONER'S RIGHT TO PERSONAL SECURITY IN A GROSSLY NEGLIGENT MANNER

Petitioners do not argue that respondents acted negligently. Rather, they argue that respondents' violation of Joshua's right to personal security was

grossly negligent.[14] The Seventh Circuit appears to have accepted plaintiffs' characterization as accurate without discussing its legal significance. 812 F.2d at 303. Assuming this Court even reaches the question, it can and should find that gross negligence is sufficient to establish liability for a violation of substantive due process.[15]

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[14] It seems of little value to attempt to distinguish the various standards such as gross negligence or deliberate indifference or recklessness. Each formulation describes a state of mind greater than negligence and less than intent.

[15] The district court did not discuss or make findings concerning the defendants' degree of culpability, whether negligent, grossly negligent, or intentional. The court of appeals referred in passing to the actions of defendant Kemmeter as reckless. DeShaney, 812 F.2d at 303. The court of appeals did not find it necessary to address the question of whether gross negligence would suffice to establish liability for a violation of the right to substantive due process. Because neither of the lower courts addressed this question, it would be inappropriate for this Court to address it in the first instance. Rather the Court should remand to

(continued...)

Because § 1983 does not contain any particular state of mind requirement, Monroe v. Pape, 363 U.S. 167 (1961); Parratt v. Taylor, 451 U.S. 527 (1981), the Court must look to the particular constitutional right allegedly violated in determining the requisite degree of culpability. Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). However, in conducting that inquiry, this Court is not writing on a clean slate.

Four justices have suggested that a city's gross negligence in training its police force is sufficient to establish liability under § 1983. City of Springfield v. Kibbe, 107 S.Ct. 1114, 1121

15/ (...continued)
allow the district court and the court of appeals to make factual and legal findings concerning the necessary degree of culpability.

(1987)(O'Connor, Rehnquist, White and Powell, JJ., dissenting). Three justices have indicated that gross negligence is sufficient to establish a violation of procedural due process. Davidson, 474 U.S. at 349, 358 (Brennan, Blackmun, Marshall, JJ., dissenting). The deliberate indifference standard that applies under the Eighth Amendment is analogous to gross negligence. Estelle v. Gamble, supra. A police officer cannot escape liability under the Fourth Amendment if his search warrant is based on a recklessly false affidavit. United States v. Leon, 468 U.S. 897 (1984). In addition, punitive damages may be recovered in a § 1983 case based on gross negligence. Smith v. Wade, 461 U.S. 30 (1983).16/

16/ The lower federal courts have also accepted gross negligence in a variety of § 1983 contexts.
(continued...)

There is nothing in the language or history of the Due Process Clause to suggest that its provisions can only be violated by a higher degree of culpability than required by the Eighth Amendment, for example. Simply in terms of the constitutional text, the Eighth Amendment prohibits the "infliction" of cruel and unusual punishment, a word suggesting at least as much and perhaps more deliberateness than the reference in the Fourteenth Amendment

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16/ (...continued)
Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981); Villante v. Dep't of Corr., 786 F.2d 516 (2d Cir. 1986); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982); Hinshaw v. Doffer, 785 F.2d 1260 (5th Cir. 1986); Porm v. White, 762 F.2d 635 (8th Cir. 1985); Owens v. City of Atlanta, 790 F.2d 1564 (11th Cir. 1986); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987); Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement, 46 Cin. L. Rev. 45, 57 n.64 (1977), and cases cited therein.

to a "depriv[ation]" of liberty or property.

Furthermore, this Court's decisions in Daniels and Davidson are not to the contrary. Unlike Davidson and Daniels, this case alleges a violation of substantive due process, not procedural due process. The Court in Daniels specifically noted that the state of mind requirement might be different depending upon the specific constitutional right alleged to have been violated. Daniels, 474 U.S. at 334. Additionally, the plaintiffs in those cases were arguing for recovery based on simple negligence. The Court explicitly left open the question of whether gross negligence would support liability for a violation of even procedural due process, Daniels, 474 U.S. at 334 n.3.

In Daniels, the Court also expressed its concern about trivializing the Due Process Clause. 474 U.S. at 332-333, which the Court described as a protection against "the arbitrary exercise of the powers of government," id. at 331, quoting Hurtado v. California, 110 U.S. 516 (1884), and a protection from the use of governmental power for the purpose of oppression. Id.

Whatever else may be said about this case, it is hardly trivial. Moreover, when a state employee exercises state power with gross negligence (or recklessness, or deliberate indifference), then it is appropriate to say that the worker's action was not just the inadvertent error of an individual but an abuse of the governmental power delegated to that individual. Estelle v. Gamble, 429 U.S. 97 (deliberate indifference to prisoner's

medical needs is abuse of governmental power); Youngberg v. Romeo, 457 U.S. 307 (failure to exercise professional judgment to protect institutionalized mentally retarded person from physical harm is abuse of governmental power).

In addition, there are strong policy reasons for recognizing a right to sue for grossly negligent actions that violate the right to substantive due process. The prophylactic effect of a rule prohibiting more negligent action would be minimal. However, given the degree of deliberateness implied by a gross negligence standard, recognition of liability could have a prophylactic effect in inducing governmental authorities to conform their conduct to the fundamental fairness represented by the substantive due process doctrine. This Court has previously recognized the

importance of that goal. See Smith v. Wade, 461 U.S. at 49.

For all these reasons, petitioners are entitled to recover if they can establish that the respondents violated their substantive due process right to personal security in a grossly negligent manner.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

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